

# EXHIBIT “I”

1                               IN THE UNITED STATES DISTRICT COURT

2                               FOR THE DISTRICT OF HAWAII

3                               \_\_\_\_\_ )

4       WAYNE BERRY,                               ) )

5                               Plaintiff,                               ) CIVIL NO. 01-00446SPK-LEK

6                               vs.                               ) )

7       FLEMING COMPANIES, INC.,                               ) )

8       aka FLEMING FOODS, INC.,                               ) )

9       aka FLEMING, DOE                               ) )

10       INDIVIDUALS 1-50 and                               ) )

11       DOE PARTNERSHIPS,                               ) )

12       CORPORATIONS and OTHER                               ) )

13       ENTITIES 1-20,                               ) )

14                               Defendants.                               ) )

15       \_\_\_\_\_ )

13                                 TRANSCRIPT OF PROCEEDINGS

15                   The above-entitled matter came on for Further  
16 Jury Trial commencing at 9:20 a.m. on Friday, February  
17 28, 2003, Honolulu, Hawaii,

19       BEFORE:   HONORABLE SAMUEL P. KING  
20                   United States District Judge  
21                   District of Hawaii

23

24 REPORTED BY: LISA J. GROULX, COURT REPORTER

1

2

A P P E A R A N C E S

3

4

5

6 FOR PLAINTIFF: TIMOTHY J. HOGAN, ESQ.

7 WESLEY W. ICHIDA, ESQ.

8 LYNCH ICHIDA THOMPSON KIM & HIROTA

9 1132 Bishop Street, Suite 1405

10 Honolulu, Hawaii 96813

11 (808) 528-0100

12

13

14 FOR DEFENDANTS: LEX R. SMITH, ESQ.

15 ANN TERANISHI, ESQ.

16 Kobayashi, Sugita & Goda

17 First Hawaiian Center

18 999 Bishop Street, Suite 2600

19 Honolulu, Hawaii 96813

20 (808) 539-8700

21

22

23

24 ALSO PRESENT: Ralph Stussi

25

1

2

# I N D E X

3

4

5

6

7 PLAINTIFF'S WITNESSES:

PAGES

8

9 PHILLIP JOHNSON

10 Direct examination by Mr. Hogan

5

Cross-examination by Mr. Smith

24

11

12 MARK DILLION

Direct examination by Mr. Hogan

43

13 Cross-examination by Mr. Smith

77

Redirect examination by Mr. Hogan

82

14

15 RALPH STUSSI

Direct examination by Mr. Hogan

85

16

17

18 EXHIBITS:

MARKED

RECEIVED

19 Plaintiff's Exhibit 4

22

20 Defendant's Exhibit 244

23

21

22

23

24

25

1           And as I was going through the whole shut  
2     down period or negotiating the contract, what I was  
3     trying to determine was whether we would continue to  
4     utilize a system and some of the people that were from  
5     API to do this function internally or whether I would  
6     just seek another party, another consolidator, to  
7     perform that function and deliver those containers to  
8     our yard.

9           Q.   Well, isn't it true you did choose another  
10    consolidator, Hawaiian Express?

11          A.   The only role that Hawaiian Express performed  
12    was not necessarily the tracking. They performed the  
13    labor of unloading the product on the west coast and  
14    in some cases combining that product from several  
15    different purchase orders or several different vendors  
16    into one container and then making arrangements to  
17    deliver it down to the shipping yard for shipment  
18    over.

19          Q.   And they pre-receive the shipments, don't  
20    they, sir?

21          A.   I don't know what you mean by pre-receive.  
22    They receive the shipments there on the west coast to  
23    determine that the product is there and that damage  
24    hasn't occurred prior to its arrival at the port.

25          Q.   Right. And then they input through Mr.

1 Berry's system the information upon that receiving;  
2 isn't that correct, sir?

3 A. There is information that's captured at the  
4 west coast. And I'm not completely familiar. They  
5 take pictures, digital pictures of loads as they come  
6 in and transmit those over the Internet to us. They  
7 do record the quantities that are there.

8 If some product doesn't show up that's  
9 suppose to be there, they can let a buyer here in  
10 Hawaii know that it didn't make it to the west coast  
11 and, therefore, they can order that product again  
12 before the five days it takes to get the product over  
13 here.

14 Q. Right. And that's exactly what API was doing  
15 before it shutdown; isn't that correct, sir?

16 A. The API personnel that were at the terminals  
17 on the west coast were performing that function, yes.

18 Q. Through Mr. Berry's system, correct?

19 A. They had computers there that were accessing  
20 the database and they were keying things in there,  
21 that's correct.

22 Q. And taking pictures of the containers before  
23 the door shut and running it through the Internet, and  
24 all of that was going through the API system prior to  
25 HEX, correct?

1           A.    That was -- when you talk about the digital  
2   pictures, I think that was just over an Internet  
3   connection, just as we would email something, yes.

4           Q.    Right.  But that was something that API  
5   provided to Fleming from its terminals on the mainland  
6   in 1999, correct?

7           A.    Those are something that can be provided over  
8   that, yes.

9           Q.    But are you saying it wasn't being provided  
10   in 1999?

11                   THE COURT:  By API?

12          Q.    By API.

13          A.    Up until the time of the shut down period,  
14   yes, it was provided.

15          Q.    Right.  So if Mr. Berry had shut down the  
16   operation and you went and got another freight  
17   forwarder, in the case you got HEX, they wouldn't have  
18   the system to run, would they?  They would have been  
19   shut down too?

20          A.    I don't believe that's correct.

21          Q.    Why?  Did they have the system before API  
22   shut down?

23          A.    I think anybody can transmit a photograph  
24   over the Internet as long as you have an Internet  
25   connection.  And I have to believe that any other

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF HAWAII  
3                   \_\_\_\_\_  
4                   WAYNE BERRY,                   )  
5                   Plaintiff,                   ) CIVIL NO. 01-00446SPK-LEK  
6                   vs.                   )  
7                   FLEMING COMPANIES, INC.,                   )  
8                   aka FLEMING FOODS, INC.,                   )  
9                   aka FLEMING, DOE                   )  
10                  INDIVIDUALS 1-50 and                   )  
11                  DOE PARTNERSHIPS,                   )  
12                  CORPORATIONS and OTHER                   )  
13                  ENTITIES 1-20,                   )  
14                  Defendants.                   )  
15                  \_\_\_\_\_)

13                   TRANSCRIPT OF PROCEEDINGS

14  
15                   The above-entitled matter came on for Further  
16                   Jury Trial commencing at 9:05 a.m. on Monday, March 3,  
17                   2003, Honolulu, Hawaii,  
18

19                   BEFORE:   HONORABLE SAMUEL P. KING  
20                   United States District Judge  
21                   District of Hawaii  
22

23  
24                   REPORTED BY:   LISA J. GROULX, COURT REPORTER  
25                   Notary Public, State of Hawaii

                  LISA GROULX & ASSOCIATES  
                  (808) 225-5701



1

2

A P P E A R A N C E S

3

4

5

6 FOR PLAINTIFF: TIMOTHY J. HOGAN, ESQ.

7

LYNCH ICHIDA THOMPSON KIM & HIROTA

8

1132 Bishop Street, Suite 1405

9

Honolulu, Hawaii 96813

10

(808) 528-0100

11

12

13 FOR DEFENDANTS: LEX R. SMITH, ESQ.

14

ANN TERANISHI, ESQ.

15

Kobayashi, Sugita & Goda

16

First Hawaiian Center

17

999 Bishop Street, Suite 2600

18

Honolulu, Hawaii 96813

19

(808) 539-8700

20

21

22

23 ALSO PRESENT: Ralph Stussi

24

25

LISA GROULX & ASSOCIATES  
(808) 225-5701

1	I N D E X		
2			
3	PLAINTIFF'S WITNESSES:		PAGES
4			
5	RALPH STUSSI		
6	Direct exam (Resumed) by Mr. Hogan	4	
7	Cross-examination by Mr. Smith	13	
8			
9			
10	DEFENDANT'S WITNESSES:		
11			
12	CAROL LERCHE		
13	Direct examination by Mr. Smith	20	
14	Cross-examination by Mr. Hogan	55	
15			
16	RALPH STUSSI		
17	Direct examination by Mr. Smith	65	
18	Cross-examination by Mr. Hogan	110	
19	Redirect examination by Mr. Smith	126	
20			
21			
22	EXHIBITS:	MARKED	RECEIVED
23	Plaintiff's Exhibit 138		57
24	Defendant's Exhibit 282		35
25	Defendant's Exhibit 218		78

1 Q. Okay. The Exhibit 52 says: We only intend  
2 to use the software to support our local freight  
3 operation. Has Fleming honored that representation?

4 A. Yes, I believe so.

5 Q. Have you used to, it your knowledge, for any  
6 purpose other than supporting the local freight  
7 operation?

8 A. No, we have not.

9 Q. What does local freight operation mean to  
10 you?

11 A. I believe it's the logistics operation that  
12 exists there in Kapolei that controls the activities  
13 that are happening at the Hawaii division.

14 Q. It says: Fleming will not sell or issue  
15 copies to other businesses. Has Fleming honored that  
16 statement?

17 A. Yes, I believe so.

18 Q. What about the fact that the people in  
19 California who operate the computers there are on the  
20 payroll of Hawaiian Express rather than Fleming?

21 A. I have always felt -- or my understanding,  
22 especially at that time, was that the computers that  
23 were operating on the west coast were attached to a  
24 server that was in Hawaii and the database, as such,  
25 existed on the server and they were merely inputting

1 information into the database that existed in Kapolei.

2 And so I believe all they were doing was a  
3 data entry function of some of the information that  
4 they were finding out on the west coast into the  
5 server that existed in Kapolei.

6 Q. Do those people who operate the database in  
7 California for Fleming use it for anything other than  
8 supporting Fleming's local freight operation?

9 MR. HOGAN: Objection. Lacks personal  
10 knowledge, Your Honor.

11 THE COURT: If you know.

12 A. Not to my knowledge.

13 Q. (By Mr. Smith) It says: We do not intend to  
14 --

15 THE COURT: Are these former employees?

16 THE WITNESS: I'm sorry, Your Honor.

17 THE COURT: Are these former employees  
18 of API or different people?

19 THE WITNESS: The employees that -- I  
20 can only speak to the time that I know. But there was  
21 a point where at least one of the Fleming employees  
22 went to work for HEX and so was off of our payroll but  
23 was hired by HEX. I'm not sure what happened to the  
24 other individual.

25 Q. (By Mr. Smith) And the person you're